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BAANU MOHAN v. AIA BHD

HIGH COURT MALAYA, KUALA LUMPUR

MOHD ARIEF EMRAN ARIFIN J

[CIVIL SUIT NO: WA-22NCC-700-10-2024]

16 JUNE 2025

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Abstract – *An employer or a principal is not entitled to dictate that the spouse of an agent of employee cannot gain employment or work in any form from another competing company. Such restriction on third parties' rights of employment that is indirectly imposed through a contracting party falls foul of s. 28 of the Contracts Act 1950 ('CA'). Section 28 of the CA has made it very clear that any agreement where 'anyone is restrained from exercising a lawful profession, trade or business of any kind' is to that extent void.*

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CONTRACT: *Employment contract – Agency – Terms and conditions – Clause restricting right of spouse of agent of insurance company from taking employment with another insurance company or takaful operator – Restriction on third parties' rights of employment indirectly imposed through contracting party – Whether clause fell foul of s. 28 of Contracts Act 1950*

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An issue of law appeared in the pleaded case of the parties that should be determined before the matter proceeds to be heard at trial. The issue that must be determined was whether the clause relied on by the defendant was valid in law and whether it was contrary to ss. 28 and 24 of the Contracts Act 1950 ('CA'). The clause that was in question that allegedly appeared in the Agency Compensation Handbook Version 7.4 and formed part of the contract between the plaintiff and the defendant was '2.2.6 In the event that the life planner's spouse is an agent of another insurance company/Takaful operator, this will result in termination of the life planner's contract unless the life planner's spouse has terminated the contract with the other insurance company/Takaful operator'. Essentially, this term restricted the right of the spouse of an agent of the insurance company from taking any form of employment with another insurance company or takaful operator at any material time. If the spouse of an agent took up such employment, then the agent contract with the defendant would be automatically terminated. The defendant argued that the above clause did not fall foul of s. 28 of the CA.

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Held (ordering accordingly):

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(1a) An employer is entitled to expect that his employee or even his agent to be filial to it during the period of employment. He or she must not undertake another employment with another company or employer as that may breach his duties of fidelity to his employer. However, this did not mean that the employer or principal such as the defendant, is entitled

to dictate that the spouse of the agent or employee could not gain employment or work in any form with another competing company. This was contrary to s. 28 of the CA. More so when s. 28 made it very clear that any agreement where 'anyone is restrained from exercising a lawful profession, trade, or business of any kind' is to that extent void. (paras 9 & 10)

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(1b) The word chosen by the legislator is 'any person' compared to 'any party thereto' as seen in ss. 19, 23 and 29 of the CA. This envisages a situation where the restriction is not only on the party to the contract but also against any party or persons who are related to the contracting parties. Such restriction on third parties' rights of employment that is indirectly imposed through a contracting party would also fall foul of s. 28 of the CA. Therefore, the clause that restricts the spouse of an agent from taking any employment or position with a competing entity is void. (paras 10 & 11)

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(1c) The defendant was not entitled to restrict the spouse of an agent from acting as an agent of another competing company. The spouse of an employee or even the agent of the defendant is entitled to undertake any job or employment that he or she wishes. The defendant was not entitled to indirectly control and restrict the spouse's right of employment and then terminate the agent's agreement if the said agent's spouse decides to take up any employment with a competing agent. That is not allowed under s. 28 of the CA. (para 11)

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(2) This preliminary finding by this court did not exhaust the issues that were pending in this case. The issues raised by the defendant concerning the fiduciary duties owed by agents and the alleged wrongs done by the plaintiff that caused the termination due to the breach of these alleged fiduciary duties were all issues that would be determined at trial. Save for the validity of the above referred clause, the other issues raised by the parties remain *status quo* pending the outcome of the trial. (paras 12-16)

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Case(s) referred to:

Polygram Records Sdn Bhd v. Hillary Ang & Ors (Collectively Known As "The Search") & Anor [1994] 3 CLJ 806 HC (refd)

Legislation referred to:

Contracts Act 1950, ss. 19, 23, 24, 28, 29
Rules of Court 2012, O. 33 r. 2

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For the plaintiff - Vijaya Rajendram; M/s Zul Vijay Chander & Assocs
For the defendant - Dhanyaa Shreeya; M/s Skrine

Reported by Suhainah Wahiduddin

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JUDGMENT**Mohd Arief Emran Arifin J:****Introduction**

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[1] This is the decision of this court on the issue of law that appears in the pleaded case of the parties that should be determined before this matter proceeds to be heard at trial on 8 December 2025 to 10 December 2025.

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[2] I have exercised the powers reposed in O. 33 r. 2 of the Rules of Court 2012. I believe the first issue that must be determined is whether the clause relied on by the defendant is valid in law and whether it is contrary to ss. 28 and 24 of the Contracts Act 1950.

Decision Of Court

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[3] The clause that is in question that allegedly appears in the Agency Compensation Handbook Version 7.4 and forms part of the contract between the plaintiff and the defendant, is as follows:

2.2.6. In the event that the Life Planner's spouse is an agent of another insurance company/Takaful operator, this will result in termination of the Life Planner's contract unless the Life Planner's spouse has terminated the contract with the other insurance company/Takaful operator.

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[4] Essentially, this term restricts the right of the spouse of an agent of the insurance company from taking any form of employment with another insurance company or takaful operator at any material time. If the spouse of an agent takes up such employment, then the agent contract with the defendant will be automatically terminated.

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[5] This therefore restrains the right of the spouse of any agent of the defendant from acting as agents of any other insurance company or takaful operator in Malaysia.

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[6] I find that this restriction is contrary to s. 28 of the Contracts Act 1950 which states:

Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.

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[7] The defendants argue that the above clause does not fall foul of s. 28 of the Contracts Act 1950 and relies on the following excerpts from the leading case on this area of Visu Sinnadurai J in *Polygram Records Sdn Bhd v. Hillary Ang & Ors (Collectively Known As "The Search") & Anor* [1994] 3 CLJ 806; [1994] 3 MLJ 127:

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... To otherwise hold that every contract which contains a covenant restricting a party from practising his trade or profession, both during the currency of the employment, and the post-employment period, as a contract in restraint of trade under s. 28, would have far-reaching consequences on normal commercial contracts, such as the present one.

...

Section 28 is only applicable in cases where a person is restrained from carrying on his trade or profession in the traditional sense of the doctrine, that is, in the post-contract period and not during the currency of the contract. In this regard, I hold that the English cases which have held such covenants to be in restraint of trade are distinguishable, as the law applied by the English courts differs to that which is applicable under the Act in Malaysia.

[8] The defendant suggests that s. 28 of the Contracts Act 1950 is only applicable where the restriction arises after the end of the contract and that the restriction is imposed against the former employer from taking a post or employment in a competing company or from undertaking his trade thereafter.

[9] I agree with the defendant's argument on the above issue that during the course of the employment contract or partnership surely the restriction of taking up another employment is a valid clause. That is not prohibited by s. 28 of the Contracts Act 1950. As explained by Visu Sinnadurai J, an employer is entitled to expect that his employee or even his agent to be filial to it during the period of employment. He or she must not undertake another employment with another company or employer as that may breach his duties of fidelity to his employer.

[10] However, this does not mean that the employer or principal such as the defendant, is entitled to dictate that the spouse of the agent or employee cannot gain employment or work in any form with another competing party. That I find is contrary to s. 28 of the Contracts Act 1950. More so when s. 28 made it very clear that any agreement where "anyone is restrained from exercising a lawful profession, trade, or business of any kind" is to that extent is void. The word chosen by the legislator is "any person" compared to "any party thereto" as seen in ss. 19, 23 and 29 of the Contracts Act 1950. This envisages a situation where the restriction is not only on the party to the contract but also against any party or persons who are related to the contracting parties. Such restrictions on third parties' rights of employment that is indirectly imposed through a contracting party would also fall foul of s. 28 of the Contracts Act 1950.

[11] Therefore, I find that the clause that restricts the spouse of an agent from taking any employment or position with a competing entity is void. The defendant is not entitled to restrict the spouse of an agent from acting as an agent of another competing company. The spouse of an employee or even the agent of the defendant is entitled to undertake any job or employment that he or she wishes. The defendant is not entitled to indirectly control and restrict the spouse's right of employment and then terminate the agent's agreement if the said agent's spouse decides to take up any employment with a competing agent. That is not allowed under s. 28 of the Contracts Act 1950.

- A [12] Take note that this preliminary finding by this court does not exhaust the issues that are pending in this case and that the claim between parties will proceed at trial on the dates fixed as stated earlier. I do not impose any form of liability against the defendant in any form whatsoever.
- B [13] The issues raised by the defendants that will be determined by this court could be summarised as follows:
- (i) whether the termination of the agency agreement is valid?
 - (ii) whether there was any wrongdoing on the part of the plaintiff that justified the termination?
- C (iii) whether the wrongs alleged against Mr Ponnu could be attributed to the plaintiff?
- (iv) whether the plaintiff had any duty to disclose the action of Mr Ponnu in joining a competitor?
- D [14] The above preliminary finding on the validity of the clause referred to by the defendant does not in any way estop the defendant from raising all of the above defences at trial.
- E [15] Therefore, the issues raised by the defendant's counsel concerning the fiduciary duties owed by agents and the alleged wrongs done by the plaintiff that caused the termination due to the breach of these alleged fiduciary duties are all issues that would be determined at trial.
- F [16] I also state that, save for the validity of the above referred clause, the other issues raised by the parties remain *status quo* pending the outcome of the trial. No finding of liability is made against the defendant at any material time. I have only directed that parties address the above issue of law to reduce the number of issues to be determined at trial in order to save time and costs as well to ensure that the trial is conducted in an efficient manner.

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